

## Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India

*Werner Menski*

### I. INTRODUCTION: THE REALITIES OF PLURALISM

The starting point of this chapter is somewhat different from that of most contributors to this volume, in part because of my late-comer status to the project, as well as my outsider perspective. Some European legal systems, but also Canada and the United States, have over time developed highly regulated state-centric methods of family law management that seemed to leave little or no room for religious and other authorities to make any input. Today's agonized debates over the emergence of some eighty-five Sharia Councils and Muslim Arbitration Tribunals in Britain thus reflect surprise, to put it mildly, that supposedly strong states are in fact not fully in control of family law regulation.

Such debates (if one can call them that) show that it is not sufficiently well known in a global context that European and North American models of regulatory framework are not universally replicated all over the globe. Colonialism never fully achieved its ambitious civilizing missions. In particular, it did not wipe out most preexisting sociocultural (and thus legal) traditions, but it did influence them. Today there is certainly no single, global method of managing family relations through state intervention. Rather, there are many ways of handling family law. Individual states have gradually developed patterns that suit their country-specific needs and national identities. In many cases, however, colonial intervention and other interferences imposed certain patterns that are not even close to what one may call "indigenous." Hybridity of legal regulation is thus a global fact everywhere; pluralism of methods, specifically in the management of family relations, is a global reality.

For many scholars, this raises the question (in my view quite misguided) of whether it is possible to conceive of and develop an ideal model suitable for all. In this respect, it seems that the grass is always greener on the other side of the fence. Hence many countries with state-centric regulation mechanisms, including the United States and Canada, are now debating whether there should be less state

control or a more sophisticated method of state-driven intervention such as a revised multi-tiered system of legal regulation.<sup>1</sup> At the same time, many legal systems that have retained less state control have been engaged in equally tortuous discussions over increasing state involvement.

In the world as a whole, I see today three types of legal systems<sup>2</sup>: (1) those that claim to have state-centric regulation through all-encompassing general laws for all citizens or residents, with France being a somewhat extreme example; (2) countries like the United States, Canada, Australia, New Zealand, and many others that maintain a fairly centralized system but allow a unique legal position for one particular group of people, often the original inhabitants of the land; and (3) countries and legal systems that incorporate an explicitly pluralistic combination of “general law” and various country-specific “personal laws” for different groups of people, not necessarily on the basis of religion. The third category is much larger than Eurocentric scholars seem to be aware. It certainly includes countries like South Africa<sup>3</sup> and actually comprises most countries of Asia and Africa. For example, the Indian legal system has had to manage religious and legal pluralism for thousands of years. It has coped with the presence of Muslim personal law for centuries and today covers more than 150 million Muslims within an officially secular legal framework.<sup>4</sup>

Various personal law methods of legal regulation apply to the majority of the world’s population today and are not historical remnants from Roman or Ottoman times. These powerful legal realities deserve respect for their capacity to operate intricate regulatory frameworks for billions of people. Assuming that one’s own system, or any one particular system for that matter, is somehow the norm is a fatal methodological error. We must acknowledge that no legal system in the world has managed to maintain perfect justice at all times before we pass judgment on distant “others.”

On the one hand, it is evident from this volume that state-centric types of legal systems in the first and second categories currently face debates about pluralization;

<sup>1</sup> On governability, see Katherine Osterlund, “Love, Freedom and Governance: Same-Sex Marriage in Canada,” *Social & Legal Studies* 18:1 (March 2009): 93–109. See also Joel A. Nichols, “Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community,” *Vanderbilt Journal of Transnational Law* 40 (January 2007): 135–196; and Joel A. Nichols, “Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion” (in this volume).

<sup>2</sup> Werner Menski, “Law, Religion and South Asians in Diaspora,” in *Religious Reconstruction in the South Asian Diasporas: From One Generation to Another*, ed. John R. Hinnells (Basingstoke: Palgrave Macmillan, 2007), 243–264, 252–257.

<sup>3</sup> See Johan D. van der Vyver, “Multi-Tiered Marriages in South Africa” (in this volume).

<sup>4</sup> In India, “secular” means equidistance of the state from all religions, which is not quite the same as the U.S. system, although there are remarkable overlaps. See Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington, IN: Indiana University Press, 2001).

relaxation of state control; less rigid formality regarding marriage, aspects of divorce, and related matters; and post-divorce maintenance law.<sup>5</sup> They face pressure to adopt pluralization and more explicit recognition of various interactive boundary crossings between state regulation and other normative orderings. On the other hand, states in the third category have found themselves under various pressures to modernize, impose uniform rules, and effect more centralized state control, specifically to reform and control “religious” personal law systems. Often explicitly portrayed as an urgent matter of justice, these pressures aim for what in India is called a “Uniform Civil Code.” Found in Article 44 of the Indian Constitution of 1950 and framed as a program for the future, it envisages a new civil law structure that would apply to all people.<sup>6</sup>

Although pulling the state out of marriage and family law altogether is rightly considered risky and is probably not really sustainable, *de facto* pluralization, particularly as a result of new sociocultural developments and recent migrations from other parts of the world,<sup>7</sup> has become a part of social reality in the Western world.<sup>8</sup> Such developments – nothing new in countries outside the Western hemisphere – have given rise to whole new sets of literature that largely agonize over fears of state-centric mechanisms losing control to religious authorities and other forces right in our midst. This loss of control is perceived as undermining various forms of human rights protections and is portrayed as particularly negative for women and children.<sup>9</sup> Somehow, it is never questioned in depth whether state regulation does not also pose risks of certain kinds of violence and infringements of basic rights. In South

<sup>5</sup> See, e.g., Brian H. Bix, “Pluralism and Decentralization in Marriage Regulation” (in this volume); Daniel Cere, “Canadian Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism?” (in this volume); Ann Laquer Estin, “Unofficial Family Law” (in this volume); Nichols, “Reconsidering the Boundaries” (in this volume).

<sup>6</sup> As shown in this chapter, this anticipated development did not materialize. An astute early critic of excessive positivism quite rightly called this “no more than a distant mirage.” Antony Allott, *The Limits of Law* (London: Butterworth, 1980), 216.

<sup>7</sup> Rather than treating this as a form of legal transplant, I speak about reverse colonization and call this private importation of ethnic minority legal concepts “ethnic implants.” See Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2d ed. 2006), 58–65.

<sup>8</sup> For Britain, much before the Archbishop of Canterbury made his comments and caused a storm, I devised the concept of British Muslim law (*angrezi shariat*) as a hybrid entity to indicate that state control over family law can never be absolute. Various communities and individuals in their daily lives, rather than states, face the challenges of navigating the boundaries of official and unofficial laws. For details, see David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 3d ed. 1998). On the U.S. scenario, see Saminaz Zaman, “*Amrikan Shari’a*: The Reconstruction of Islamic Family Law in the United States,” *South Asia Research* 28:2 (July 2008): 185–202.

<sup>9</sup> See, e.g., Linda C. McClain, “Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship” (in this volume) and Robin Fretwell Wilson, “The Perils of Privatized Marriage” (in this volume).

Asia, at any rate, states are well known as the worst violators of the law. Moreover, secular civil law regulation is certainly not value-neutral, but scholars often seem to “know” what is good and bad, prejudging the entire field through preconceived notions. Scholars thereby exhibit various forms of amnesia and myopia, specifically when it comes to assessing developments in non-European legal contexts. As someone with one foot in the East and one in the West, I find myself having to write one article after the other about such issues.<sup>10</sup>

The present volume seeks to take the debate about management of family law further than the existing literature. The main question appears to be whether delegating authority to religious authorities would be a feasible method of meeting the challenges of increased sociocultural pluralization and of new forms of family arrangement. New patterns often go well beyond the standard norm of marriage as a lifelong bond between one man and one woman to the exclusion of all others; they comprise both the retraditionalizing effects of global non-Western migration in all directions and also the recent manifestations of modern Western sociocultural changes. I find the focus of analysis a little too narrowly put on the competition of state law and religion, when in fact the field is much more complex and plural than mere binary pairings of these elements – of East and West, or North and South, or of tradition and modernity. Reality almost everywhere is increasingly marked by superdiversity.<sup>11</sup> Whereas the focus in this volume is largely on U.S. law and whether a multi-tiered marriage system would be a suitable form of legal regulation, my contribution to this debate aims to show that a sophisticated pluralistic regulatory system has already existed in India for thousands of years, only more recently supplemented by stronger and more explicitly targeted state control. This indicates that abandoning the state altogether does not seem feasible, but ignoring the other inputs and players is not a feasible solution either. So perhaps we must be active, conscious pluralists, whether we like it or not.

Starting from ancient pluralistic roots of legal self-regulation, Indian law offers a model that has always respected various competing religious and cultural normative patterns while gradually developing increasingly fine-tuned overall state control, albeit with notable limits to positivist intervention. This Indian method of managing “good governance” has turned into a specific form of a social welfare state. However, in this system of partial regulation, the state is neither willing nor able to devote sufficient resources to rescue disadvantaged citizens; it mainly aims to create supportive conditions for self-controlled ordering of human actions. This is also true when

<sup>10</sup> See, e.g., Werner Menski, “Beyond Europe,” in *Comparative Law: A Handbook*, eds. David Nelken and Esin Örücü (Oxford: Hart Publishing, 2007), 189–216.

<sup>11</sup> On Britain still overlooking the legal dimensions of such super-diversity, see Steven Vertovec, “Super-Diversity and its Implications,” *Ethnic and Racial Studies* 30:6 (November 2007): 1024–1054.

it comes to social welfare arrangements.<sup>12</sup> With many more than a billion citizens today, the flip side of state respect for religious and social self-control in India is now increasingly manifesting itself as explicit reliance on family and communal support mechanisms, especially among women, children, and the elderly.<sup>13</sup> As a result, the state calls on men and other persons who have control over resources to operationalize enhanced obligations rather than enjoy superior rights. This responsibility arises from the basic foundations of traditional value systems in Indic cultures, which are built on presumptions of interconnectedness and duties toward others rather than on individual rights.

Managing this particular method of family law regulation has never been easy or uncontroversial. The Indian state today largely continues to sit back and let people decide the details of how to lead their lives. The state offers merely a symbolic safety net through somewhat symbolic fundamental rights guarantees, and little more. However, these minimal guarantees undergird Indian state interventions if there are unsustainable or blatantly unjust or imbalanced developments within various societies and religious normative orders. For example, the definition of “wife” in Indian law has since 1973 included “divorced wife.”<sup>14</sup> It took decades for this deliberate manipulation of social relations to occur, yet this subtle move has proven powerful in the long run. These seemingly symbolic state interventions probably now also influence private interactions between individuals in their homes. (Laborious fieldwork would be necessary to ascertain that.) Formal interventions may take the form of such symbolic legislation or significant judicial pronouncements, reflecting the fact that India is not just a traditional common law system but an extremely hybrid jurisdiction. This intricate interplay of various judicial and legislative elements creates powerful legal dynamisms with remarkable outcomes.

It should surprise no one that the traditional Indian method of relying on self-controlled ordering in society was never fully effective on its own. However, it is a mistake to dismiss it as too problematic rather than seeing its intrinsic ameliorative potential. Before jumping to conclusions about certain perceived crises of the state or significant alleged maldevelopments,<sup>15</sup> one first needs to understand what has

<sup>12</sup> Recent evidence of bureaucratic abuses of India’s meager welfare program strengthens doubts over the feasibility of state-centric welfare mechanisms. See Subhash Mishra, “Ghosts in the Darkness,” *India Today*, August 20, 2009, available at <http://indiatoday.intoday.in/site/Story/57748/States/Ghosts+in+the+darkness.html> (detailing how women connive with officials under a new Widow Pension Scheme to declare their husbands dead).

<sup>13</sup> See Werner F. Menski, *Modern Indian Family Law* (Richmond, UK: Curzon, 2001).

<sup>14</sup> India Code of Criminal Procedure § 125 (1973).

<sup>15</sup> Attractive-looking books such as Rajeshwari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham, NC: Duke University Press, 2003) are political manifestos rather than factually reliable legal analyses. Such writing must be treated with caution, because even basic legal facts are misrepresented.

actually been going on in Indian law “on the ground” and how such intricate pluralistic regulatory methods, grounded in thousands of years of experience handling legal conflicts, pan out today.<sup>16</sup>

Remarkably, this complex story is hardly ever told because too few legal scholars are also trained as Indologists, historians, or social scientists. Indian textbook writers are mostly sterile “black letter” lawyers who typically list one judgment after another and fail to analyze what they report. Most damaging, much writing on Indian law these days comes from scholars, often Indian scholars based abroad, who are highly politicized commentators and self-appointed social reformers. Ideological blinders and often personal agendas prevent them from giving global readership a comprehensive account of Indian legal developments. As a result, selective and highly partisan reporting on Indian family law (and many other non-Western legal systems in the world, especially neighboring Pakistan and Bangladesh) has not allowed us to gain a full picture of the various methods of legal management that exist in the interplay between so-called religious laws and civil laws in various jurisdictions around the globe and specifically in South Asia.

In this chapter, I seek to show that India’s long-tested method of handling family law intricately combines overall state control with ongoing deep respect for – and explicit recognition of – social and religious authorities. In such explicitly pluralist scenarios, no one form of authority is ever beyond criticism. No entity is allowed to control the entire field autonomously. Legal monism is restrained and every component, as Sally Falk Moore suggested decades ago, is “semi-autonomous.”<sup>17</sup> Hence, all players in South Asian legal scenarios have had to be somewhat altruistic in their interactions with other legal actors to maintain stability and continuity. Legal pluralism has long been a fact in South Asia, and such complex management is not easy to achieve; it may become unbalanced or uprooted, as can be seen from the unfortunate developments in Afghanistan and Pakistan, and to a lesser extent in Bangladesh and Sri Lanka. India appears to have reached reasonably stable democratic standards in pursuing sustainable methods of family law regulation. Recent

A prominent example is the persistent global misrepresentation of the *Shah Bano* saga in Indian law. The story of how an old Muslim lady was thrown out of marriage, deprived of her legal entitlements by an unscrupulous lawyer-husband, and then let down by a gender-insensitive legal system is brilliant scholarly fiction. This fiction has been used to support familiar allegations that “religious law” is bad for women and that modern secular state intervention in India has been totally ineffective. The real story will be discussed further in its wider context later in this chapter.

<sup>16</sup> For a sample of excellent fieldwork-based study, see Sylvia Vatuk, “Divorce at the Wife’s Initiative in Muslim Personal Law: What are the Options and What are Their Implications for Women’s Welfare?” in *Redefining Family Law in India*, eds. Archana Parashar and Amita Dhanda (London: Routledge, 2008), 200–235.

<sup>17</sup> Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

historical scholarship suggests, however, that this may have been achieved at a cost: allowing the Pakistanis to have their own neighboring state only to find that Muslim law remains a critical component in India's legal scenario.

My coverage of recent Indian developments in marriage law and post-divorce maintenance arrangements is prefaced by a brief historical overview to inform readers on the remarkable cultural and conceptual continuities in South Asian legal systems. These continuities are embedded with ancient concepts of self-controlled ordering and accountability for one's own actions, ideas originally developed outside state-centric legal regulation in various Hindu, Buddhist, Jain, and Muslim religio-cultural contexts. These multicultural building blocks are now subtly incorporated into – and ultimately supervised by – officially “secular” and religiously equidistant formal legal structures. A clear reflection of such “soft” duty-based approaches is embodied in the new Article 51A of the Indian Constitution, which comprises a set of Fundamental Duties. These include the duty “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women”;<sup>18</sup> and “to value and preserve the rich heritage of our composite culture.”<sup>19</sup>

Although modern Indian law thus looks at first sight like a Western legal system and even seems to resemble U.S. law,<sup>20</sup> the trajectory of Indian legal developments and outcomes is in fact very different from what we find in Europe or North America. Lessons from the Indian experience are therefore not directly transposable to our contexts. However, by showing how the Indian law of marriage and post-divorce maintenance has developed in recent times, I seek to illustrate that an intricate pluralist combination of state control and socioreligious management can and does work. This model offers sustainable solutions, even though it remains subject to never-ending manipulations and fine-tuning. Law, after all, is a culture-specific, dynamic process and not merely a set of rules.

## II. ANCIENT ROOTS OF PLURALISM AND BOUNDARY CROSSING

India's so-called composite culture has manifestly ancient roots.<sup>21</sup> Diversity management has been an integral element of South Asian social and legal systems for centuries. Examples include the much-maligned and heavily abused caste system,

<sup>18</sup> *Constitution of India*, Article 51A(e) (1950).

<sup>19</sup> *Ibid.*, Article 51A(f).

<sup>20</sup> Larson, *Religion and Personal Law in Secular India*.

<sup>21</sup> It seems the word “multiculturalism” – which perhaps suggests polluting *mélanges* – has become disfavored.

which evinces the basic recognition that humans have different functions in life, and also the enormously important ancient ethnic encounters that specialist scholars are still struggling to unravel.<sup>22</sup> Very few lawyers, Western or Indian, are able to perceive these basically cultural Indic roots as potent and intrinsically plural growth stimulants for an amazingly versatile system of gradually developing legal regulation.<sup>23</sup> “Hinduism” may well be a more recent term and a constructed entity, but Indic culture itself has unquestionably ancient pedigree and is manifestly more than a religious tradition.<sup>24</sup>

Indic cultural traditions include ancient textual evidence, dating to circa 1000 BCE, that explicitly and intimately connects human marriage rituals to macrocosmic phenomena.<sup>25</sup> These texts laid conceptual foundations that have receded into the past and tend to be forgotten and ignored today. They are deliberately omitted by many scholars today because of their allegedly suspect religious provenance. However, such deep-rooted concepts within the subconscious of Indic people of all kinds, including now many South Asian Muslims and Christians, continue to exert much invisible and indeed some visible influence. Many legal systems in Asia have been influenced by the migration of such early Indic concepts, especially throughout Southeast Asia and into the Far East, extending from Japan west past Afghanistan and Iran.<sup>26</sup> Excavating these ancient pluralisms helps to explain why India is so different from other jurisdictions today regarding management of family law regulations.

Given such ancient Indic foundational concepts, it is not surprising that modern Indian family law struggles with implementing state control of marriage. Marriage was, first of all, a new relationship of a man and a woman, linked to family, clan, and community and ritually connected through the solemnization of increasingly elaborate rituals directed toward the Universe. It was not primarily a matter for the state.<sup>27</sup> Interconnectedness was the key element of early Indic thought, conceptually embedded in dynamic terms like *karma* (action and its consequences) and *dharma* (the duty of everyone to do the right thing at any moment of one’s life). This concept

<sup>22</sup> A key issue here is whether Indic cultures were significantly influenced by early European or Central Asian models (“the Aryan question”) as a result of migrations. A related issue is the relative input of non-Aryan cultures, specifically Dravidian and various tribal models. The latter would bring Indians closer to Africans, which is widely resented.

<sup>23</sup> For details, see Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003).

<sup>24</sup> Werner Menski, “Hindu Law as a ‘Religious’ System,” in *Religion, Law and Tradition: Comparative Studies in Religious Law*, ed. Andrew Huxley (London: Routledge Curzon, 2002), 108–126.

<sup>25</sup> Menski, *Hindu Law*, 86–93.

<sup>26</sup> *Ibid.*

<sup>27</sup> See Stephen B. Presser, “Marriage and the Law: Time for a Divorce?” (in this volume) (concerning the nature of marriage and its connection to the state in the Western common law tradition).



was manifested in the expectation that microcosmic entities and processes should perennially be harmonized with visions of macrocosmic Order.<sup>28</sup>

The failed imperial and colonial efforts – by Muslims and especially by the British – to restructure Indian personal laws and to privilege state control are simplistically characterized by many post-colonial scholars as mischievous actions that afforded unwarranted prominence to religion. As a result, even the most recent studies on Indian family law are content to presume that Indian personal laws are just religious constructs. This intellectually impoverished approach completely ignores the intense interaction and constant border crossing between various forms of law within Hindu and Indian law and precludes even analyzing interactions between secular “general laws” and allegedly religious “personal laws.”<sup>29</sup>

Ignorance of Indic cultural traditions and unwillingness to accept and interrogate the complex subsequent developments within India’s deeply plurality-conscious family law are also reflected when surprised legal observers note and/or are forced to admit that in India today a Hindu (or indeed Muslim) marriage still becomes legally valid not through an act of state-ordained registration but through performance of requisite religious and social ceremonies. It is worth emphasizing that both religious *and* social aspects exist, underscoring the fact that manifestations of legal pluralism are not restricted to struggles between law and religion; they comprise every aspect of human existence. Marriage registration documents are not unknown, but they are normally not the appropriate final proof that a legally valid marriage exists, especially because documents can be purchased and forged.<sup>30</sup> Scholars, including many South Asian lawyers, became brainwashed by legal positivism and focus solely on “the law” and therefore struggle to understand what is really going on in the complex field of South Asian laws.

Moreover, many scholars, as this volume confirms, have deep-seated ideological problems with legal pluralism and thus tend to advise that state-centric control mechanisms promote good governance and rule of law better than allegedly limitless pluralism.<sup>31</sup> This shows that we still live in the age of positivism, which

<sup>28</sup> *Ibid.*, 71–130; Menski, *Comparative Law in a Global Context*, 196–234.

<sup>29</sup> See Parashar and Dhanda, *Redefining Family Law in India*. Notably, the very first sentence of the editors’ introduction decrees conceptual blindness and tolerates no dissent: “Family law is synonymous with religious personal laws in India.” *Ibid.*, ix.

<sup>30</sup> This was illustrated in the Workshop on Informal Marriages and Dutch Law, held in Amsterdam on March 13, 2003, under the guidance of Dr. Leila Jordens-Cotran. Although the proceedings from that Workshop are unpublished, unfortunately, they include papers explaining why Dutch immigration officials had wrongly assumed for some time, simply on the basis of marriage documents, that many marriages between foreign Muslim men and Dutch women were legally valid.

<sup>31</sup> See, e.g., McClain, “Marriage Pluralism in the United States” (in this volume); Katherine Shaw Spaht, “Covenant Marriage Laws: A Model for Compromise” (in this volume); Wilson, “The Perils of Privatized Marriage” (in this volume).

proudly claims to have developed out of earlier stages of legal theorizing that were focused on more or less religio-centric natural law. Such misguided evolutionary thinking among lawyers and other observers is simply not maintainable in the long run. Revision is reflected in the currently growing attention at last given to legal pluralism as an ever-present phenomenon,<sup>32</sup> expressed in various ways as the ubiquitous nature of law<sup>33</sup> (which is a simple word with many meanings).

This trend toward more open-minded acceptance of the law as internally plural, and thus always as its own other, was reflected in my earlier studies of legal pluralism as a global phenomenon.<sup>34</sup> My analysis has recently further considered the current expectation that international human rights norms are new forms of natural law that need to be built into global pictures of law. The result of such plurality-conscious theorizing has been the emergence of new, complex models of envisaging law and pluralism.<sup>35</sup> The messy realities of legal pluralism do not comport neatly with popular obsessions with legal certainty and will therefore irritate “black letter lawyers.”

Whereas strong Indian legal pluralism, in the sense that John Griffiths uses the term,<sup>36</sup> is partly a postmodern phenomenon, recent research has uncovered important lessons about the ubiquity of legal pluralism in time and space. It appears that Indic laws always operated beyond the boundaries of tradition and modernity. For example, evidence of acute consciousness of patterns of legal pluralism existed already in Vedic times (circa 1500 to 1000 BCE). This consciousness was characterized by heavily contested and competing truth claims in relation to law (in the wider sense of cosmic Truth – that is, natural law rather than state law) along patterns quite akin to today’s struggles over the “war on terror.”<sup>37</sup> State law was certainly not absent, but it also was clearly not dominant. Emerging concepts of the state (particularly of rulers as sponsors of certain elaborate ritual performances) remained subservient to higher forms of order, particularly macrocosmic Order. But in this heavily contested

<sup>32</sup> Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review* 30 (September 2008): 375–411.

<sup>33</sup> Emmanuel Melissaris, *Ubiquitous Law. Legal Theory and the Space for Legal Pluralism* (Farnham and Burlington, VT: Ashgate, 2009).

<sup>34</sup> Menski, *Comparative Law in a Global Context*, 82–192.

<sup>35</sup> See Masaji Chiba, ed., *Asian Indigenous Law in Interaction with Received Law* (London and New York: KPI, 1986), excerpted in Menski, *Comparative Law in a Global Context*, 119–128; Werner Menski, “Flying Kites: *Banglar Ghuri – Iceher Ghuri*. Managing Family Laws and Gender Issues in Bangladesh,” *Stamford Journal of Law* 2:1 (2009): 23; Werner Menski, “From the Amoeba to the Octopus. Socio-Legal Analysis of Plural Perspectives,” Osaka Symposium Paper, 2009 (to be published in Japanese) (forthcoming).

<sup>36</sup> See John Griffiths, “What is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1–56.

<sup>37</sup> Werner Menski, “Sanskrit Law: Excavating Vedic Legal Pluralism,” paper for the 14th International Sanskrit Conference in Kyoto, September 2009 (to be published in the Conference Proceedings) (forthcoming).

field, “religion” was also clearly not the sole or unquestionably dominant force. There were many religions and competing philosophies and visions, including atheism and agnosticism. Everything was contested among the people that lived at that time, just as we see today.

Because fine conceptual distinctions of invisible religious truth and macrocosmic Order (*rita*) are recorded as coexisting with secular visible truth (*satya*) in such early textual sources, I can now firmly deduce that struggles over law and religion are actually much older than previously imagined. However the later concept of *dharma* developed – both as a central Hindu law term and as an idea of microcosmic ordering – it is evident that Indian law today remains influenced by such early key concepts,<sup>38</sup> which we see in the Indian Constitution of 1950 and in many current laws.

The most recent legal developments in Indian family law, with which this chapter is mainly concerned, are also invisibly but deeply influenced by ancient cultural notions that link religion, society, law, and everything else into a giant web of normative elements that humans have at their disposal to arrange their day-to-day affairs. That this inevitably introduces “religion” into “secular” patterns of law making and management is a lesson that Americans should find relatively easy to understand and accept. Many South Asian scholars and others who are deeply influenced by the post-Enlightenment ideal of strict separation of law and religion sometimes find it difficult to grasp the basic meaning of “secularism” in Indian law and misunderstand it to be French-style separation of law and religion. This creates a huge obstacle for a plurality-conscious analysis of how today’s Indian family law handles competing claims among more than a billion citizens.

In such a complex field as family law, aiming for state-centric legal regulation would never lead to realistic and just outcomes and would run diametrically counter to ancient Indic principles of self-controlled ordering. These include, among others, *dharma* – the expectation to do the right thing at the right time at any point of your life.<sup>39</sup> Some fifteen years ago, the self-appointed social reformer Madhu Kishwar rightly highlighted that modern Indian legislators, conscious of such powerful ancient legal history and concepts, did not completely abolish “tradition” but rather presented ancient customs and normative patterns in a new, statutory form.<sup>40</sup> Even the flavor of this old wine in new bottles irritates many modernity-focused

<sup>38</sup> There are ongoing debates about whether the term *dharma* has more Buddhist rather than Hindu antecedents. See Patrick Olivelle, “Hindu Law: The Formative Period, 400 B.C.E. – 400 C.E.,” in *The Oxford International Encyclopedia of Legal History*, vol. 3, ed. Stanley N. Katz (New York: Oxford University Press, 2009), 151–155.

<sup>39</sup> For details see Menski, *Hindu Law*, 198–237.

<sup>40</sup> See Madhu Kishwar, “Codified Hindu Law: Myth and Reality,” *Economic and Political Weekly* 29:33 (August 13, 1994): 2145–2161.

scholars who are still desperately arguing for the abolition of tradition and seeking to segregate law and culture. They constantly attempt to hide from public view what is actually going on in Indian family law in this impossible endeavor. Seeking to redefine the whole field on their own terms, they claim to search for justice,<sup>41</sup> but they fail to remember Derrida's famous message of legal dynamism and innate plurality – namely, that justice is always *à venir*.<sup>42</sup> In reality, such efforts are merely attempts to inject certain value judgments into ongoing global debates and to deliberately silence other voices. Such scholars disregard the voices of hundreds of millions of Indians who continue to live by what I call “slumdog law,” a law aware that its people live in atrocious conditions, are desperately poor, and face rights deprivation every second of their lives.<sup>43</sup>

A legal system that knows most citizens struggle to feed themselves and their children can nevertheless endeavor to promise people fundamental rights that may then be claimed in situations of dire emergency. For most Indian legal scenarios, however, informal regulations and self-controlled ordering are much more effective remedies than formal litigation, resulting in what has now become known as “law-related outcomes.”<sup>44</sup> These outcomes are not based on strict adherence to the letter of state law, which is often too contemptuous of the average citizen to be able to offer just and acceptable solutions. To analyze such multilayered phenomena, multiple lenses are required and even open-minded analysts must be prepared for surprises. If formal laws do not always mean what they seem to say, open-eyed observation is only a first step.<sup>45</sup> Many preconceived notions of what “law” is really about are challenged by evidence of strong and deep Indian forms of legal pluralism.

In such a hotly contested and ideologically poisoned field as family law, how does one analyze the significant boundary crossings and ongoing interactions between India's personal law systems and the country's general laws? This is the major challenge for the remainder of this chapter. The next section will first outline what the legal system appears to look like, and then following sections detail various examples of plurality-conscious interaction and purposeful boundary crossings.

<sup>41</sup> Parashar and Dhanda, *Redefining Family Law in India*.

<sup>42</sup> See Melissaris, *Ubiquitous Law*, 20, 93.

<sup>43</sup> Werner Menski, “Slumdog Law, Colonial Tummy Aches and the Redefinition of Family Law in India,” *South Asia Research* 30:1 (February 2010): 67–80.

<sup>44</sup> This term surfaced in conversation with Professor Mohan Gopal, former Director of the Bangalore National Law School of India and Head of the National Judicial Academy in Bhopal.

<sup>45</sup> An important recent example is the Prohibition of Child Marriage Act of 2006, which makes child marriages in India voidable but not outright void. Additional reform proposals by the Indian Law Commission in 2008 seem to have been stalled by the realization that invalidating all child marriages would cause havoc among the very people the law seeks to protect. Such considerations did not arise from blind respect for any one religion, but owe to broader social concerns. The same goes for reform efforts to introduce compulsory registration of all Indian marriages.

### III. HINDU FAMILY LAW WITHIN COMPOSITE INDIA

India inherited an extremely complex legal system characterized by a remarkable plurality of laws when the country gained independence in 1947. Even though Pakistan was carved out at the same time as a separate state for Muslims, India (as the major successor state of the colonial Empire) knew it would need to cater to an extremely diverse population, including many Muslims. In the short-term, this meant that the traditional personal law system would need to be retained. However, India employed a common tool of nation building – also a hallmark of modern legal reform in South Asian states – to tackle personal law reforms first, beginning with the respective majority personal law. Hindu law was thus subjected to vigorous reform efforts in India, whereas Pakistan was introducing legal reforms to Muslim family law. Both countries initially ignored the minority laws altogether.

The trend of modernizing and unifying Hindu family law was first promoted by the British during the nineteenth century, and it was then carried forward by some sections of the Indian elite. These elites were instrumental in securing further legislative reforms, particularly the Hindu Women's Right to Property Act of 1937, which gave Hindu widows a "limited estate" in the share of the deceased husband to help ensure their dignified maintenance. Heated debates about various aspects of Hindu law reforms continued during the 1950s.<sup>46</sup> They were closely linked to tortuous ongoing discussions about the position and future of India's various personal laws.<sup>47</sup> The official Anglo-Hindu law at that time was mainly based on case law and precedent, whereas the major source of post-colonial Hindu law has been prominent legislative interventions.<sup>48</sup> Modern India clearly went much further than the colonial rulers in seeking to modernize and secularize Hindu law.<sup>49</sup>

Immediately after independence, vigorous debates about the future of Hindu law in India resulted in the preparation of what is often misleadingly called the "Hindu Code." This ambitious project of comprehensive codification, which also involved much proclaimed secularization and Westernization, was driven by a reform-focused

<sup>46</sup> They are well documented in J. D. M. Derrett, *Hindu Law Past and Present* (Calcutta: A. Mukherjee & Co., 1957). See also J. D. M. Derrett, *A Critique of Modern Hindu Law* (Bombay: N. M. Tripathi, 1970).

<sup>47</sup> See Tahir Mahmood, *Personal Laws in Crisis* (New Delhi: Metropolitan, 1986); Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage, 1992); Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 2000).

<sup>48</sup> For details, see Marc Galanter, *Law and Society in Modern India* (New Delhi: Oxford University Press, 1989).

<sup>49</sup> However, modernist reformers still did not attempt to abolish the traditional joint Hindu family altogether. This happened, formally, only in the southern Indian state of Kerala through the Kerala Joint Hindu Family System (Abolition) Act of 1975.

London-trained barrister, Dr. B. R. Ambedkar, who became a Buddhist to signal his disgust with Hindu caste discrimination. He was ultimately defeated, however, because his agendas were too radical. Instead, Indian lawmakers constructed an uneasy compromise between tradition and modernity: a typical pluralist assemblage in the form of four separate acts of Parliament regulating most aspects of modern Hindu family law.<sup>50</sup>

At first blush, especially to outside observers, the result appears modern, reform-focused, and uniform. However, this fragmented, state-made family law system often merely codified customary law.<sup>51</sup> On paper, polygamy was banned for Hindus,<sup>52</sup> but this reform has never been vigorously implemented. Polygamy among Hindus continues to exist and quite appropriately gives rise to rights for any affected women and children.<sup>53</sup> Numerous fault grounds for divorce were introduced in the Hindu Marriage Act.<sup>54</sup> However, the reformers not only retained the traditional law on Hindu marriage solemnization in Section 7 of the Hindu Marriage Act (discussed later in this chapter) but also allowed traditional Hindu customary patterns of divorce to continue.<sup>55</sup> This shows that India's lawmakers in the 1950s still knew the old Hindu law fairly well and were acutely aware that it would continue to apply even after the formal statutory reforms. This underscores that effective law reform clearly does not – and cannot – happen overnight or at the stroke of a pen – a fact that Indian legislators know well.

Today, most Hindu divorces do not have to go through formal proceedings in state courts, contradicting the widespread presumption that earlier supposedly religious Hindu law did not accept or even know divorces.<sup>56</sup> In socio-legal reality, divorce was always possible. Yet because it was thought to be a serious deviation from the ideal of everlasting sacramental marriage, it was downplayed and hidden. Although reformist euphoria ruled the roost for some time during the 1960 and 1970s,<sup>57</sup> and in

<sup>50</sup> These are the Hindu Marriage Act (1955), the Hindu Succession Act (1956), the Hindu Adoptions and Maintenance Act (1956), and the Hindu Minority and Guardianship Act (1956).

<sup>51</sup> Kishwar, "Codified Hindu Law."

<sup>52</sup> For details, see Menski, *Modern Indian Family Law*, ch. 3; Menski, *Hindu Law*, ch. 10.

<sup>53</sup> This means that if husbands wish to engage in polygamous arrangements, they now have to pay for the privilege, as the extremely brief but powerful Supreme Court verdict in *Sumitra Devi v. Bhikhan Choudhary*, AIR 1985 SC 765, establishes.

<sup>54</sup> Specifically in Section 13. For details, see Menski, *Modern Indian Family Law*, ch. 2; Menski, *Hindu Law*, ch. 11.

<sup>55</sup> Hindu Marriage Act § 29(2).

<sup>56</sup> Today, the picture "on the ground" remains extremely pluralistic, and Indian courts appear to give increasing recognition to customary divorces. Excellent fieldwork-based evidence on this, including reference to an instructive documentary film, is found in Livia Holden, *Hindu Divorce: A Legal Anthropology* (Aldershot and Burlington, VT: Ashgate, 2008).

<sup>57</sup> J. D. M. Derrett, *The Death of a Marriage Law* (New Delhi: Vikas, 1978), makes reference to earlier field studies about the impact of state-driven relaxations in divorce law for middle-class Hindu

1976 divorce by mutual consent was introduced, there have been no major statutory reforms to Hindu matrimonial law since then.<sup>58</sup>

Post-colonial Indian lawmakers were unable to enact fully codified, state-centric Hindu law reforms. Postmodern Indian lawmakers, including many far-sighted judges and a silently active class of bureaucrats, seem to have covertly cultivated a new “slumdog law.”<sup>59</sup> Middle-class Indians detest such a term, but my students readily adopt it as an analytical tool to cut through myopic middle-class rhetoric. Cheap, simple, and efficient self-controlled ordering processes that utilize informal methods of settling disputes remain an important component of India’s family law regime. Strong evidence is found in several significant facts and developments analyzed in this chapter: (1) Indian marriage laws largely do not require formal state registration to establish the legal validity of a marriage, but they rely on evidence of customary solemnization rituals; (2) Indian divorces do not always have to go through formal court proceedings, and Indian divorced wives, in such a potentially perilous and hostile climate, came to benefit from special protective measures in the mid-1980s onward; and (3) the overall picture is not one of total state control through official laws, but rather a pluralistic scenario in which the constant navigation of boundaries between state law and non-state law is a central systemic factor. Because Indian matrimonial law has been multi-tiered for a very long time, its analysis might indicate some significant perils and potential benefits of plurality-conscious navigation for other jurisdictions.

#### IV. THE TORTUOUS AGENDA OF LEGAL UNIFORMITY IN INDIAN LAW

Before turning to substantive family law, it is important to examine the more general issue of India’s continued refusal to develop Western-style state-centric legislation in the form of the projected Uniform Civil Code. As discussed previously, the four acts on Hindu family law are not a comprehensive code and do not purport to abolish or completely supersede the old Hindu law. Rather, they serve as a tool for further sociocultural, religious, and legal negotiations. Beyond Hindu law, the gradually restructured plurality of family law regulation for India has maintained much space for the concurrent system of traditional personal laws. This worked well even for some small minorities – including the Parsis, who lobbied successfully

women, raising doubts about the usefulness of modern matrimonial reforms. See Rama Mehta, *Divorced Hindu Woman* (Delhi: Vikas, 1975).

<sup>58</sup> Indian judges, among others, have voiced the sentiment that legislative intervention has had deeply dangerous side effects, that divorce has become too easy, and that “we are not America.”

<sup>59</sup> By “slumdog law” I mean to describe the actual ordering structures that are applied by and govern, apparently with official sanction, the numerous millions of people in India that live far below the poverty line.

during the mid-1980s for modernizing reforms to retain their ethnic identity.<sup>60</sup> Just as Hindu law (the majority personal law system) was continuously subjected to reforms, we also find separate Muslim, Christian, Parsi, and Jewish laws. The much-overlooked optional secular family law, critically important as an exit route from religious restrictions and as an alternative for foreigners, was also further reformed.<sup>61</sup> Buddhists, Jainas, and Sikhs have also been governed by the modern codified Hindu law since the 1950s, officially to reduce communal diversities. Because of the large space granted to customary traditions within the codified Hindu law, however, the inclusion of these communities has actually in practice increased the internal plurality within modern Hindu law regulation.

Although it retained the personal law system and granted much space for non-state law, India also put the agenda of state-centric national unification of laws into the Constitution. Article 44 of the Indian Constitution is an uncomfortable compromise between traditional self-controlled ordering within a personal law structure and reform-focused, state-centric legal regulation. The wording of Article 44, namely that “[t]he state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India,” indicated a long-term program for development of the nation, through a Directive Principle of State Policy rather than a guaranteed and justiciable Fundamental Right. This article, however, has remained an empty declaration despite constant rhetoric from scholars and many judges about the supposed advantages of legal uniformity and the desirability of a Uniform Civil Code.

The diverse Hindu foundations of modern Indian law, as well as the massive demographic presence and considerable conceptual input of Muslim law, preclude an easy path for formal, uniform legal development in accordance with Western models. Modern Indian law thus remains and will remain a culture-specific Asian legal system in its own right rather than an imperfect copy of some Western model. Legal plurality in Indian law will never disappear because it makes sense to retain it in a vast country that is conscious of its composite legal culture. From this perspective, too, pluralism is definitely an asset rather than a liability. Yet much agitated scholarly writing remains in favor of legal uniformity.<sup>62</sup>

<sup>60</sup> The result is the Parsi Marriage and Divorce (Amendment) Act of 1988, which contains provisions that are harmonized with the rules of the Hindu Marriage Act of 1955, as amended in 1976, and the similarly amended Special Marriage Act of 1954.

<sup>61</sup> The main provisions of this are found in the Special Marriage Act (1954), which remains an optional secular law for most spouses. Under this act, a marriage becomes legally valid when the official registration documents are signed. Significantly, this act is not used by many couples, and its provisions and cumbersome procedures are now increasingly criticized as outdated.

<sup>62</sup> See Narmada Khodie, ed., *Readings in Uniform Civil Code* (Bombay: Thacker, 1975); Vasudha Dhagamwar, *Towards the Uniform Civil Code* (Bombay: Tripathi, 1989); Madhu Deolekar, *India Needs a Common Civil Code* (Mumbai: Vivek Vyaspeeth, 1995); Kiran Deshta, *Uniform Civil Code:*



India's concept of secularism also strengthens strategies to use law as a tool for creating a more cohesive composite nation. In modern Indian law, secularism does not have the same meaning as the Western concept of separation between law and religion or between church and state.<sup>63</sup> Rather, Indian law guarantees the state's equidistance from all religions (and is somewhat akin to U.S. law in that respect)<sup>64</sup> and clearly seeks to prevent India from ever declaring itself a majoritarian Hindu Republic. This notion of equidistance proved important when Indians, some years ago, elected a Hindu nationalist government of the Bharatiya Janata Party. More people then began to understand that calls for a Uniform Civil Code would actually mean advancement of Hinduization and vigorously maligned culture-specific *hindutva* tendencies.

The nuanced Indian concept of secularism arose from historical awareness of internal pluralities among and within religions and of their ancient coexistence in the sociopolitical and legal fields. Hence, the new leaders of independent India (initially even of Pakistan) used this concept to promise religious minorities that they would not be treated as second-class citizens. In India, "secularism" posits equidistance – that is, the state's equal respect for all religions – as a *Grundnorm* of the Indian Constitution; it protects "others" against undemocratic majoritarian excesses and annihilation. Many are still haunted by the lived experience and memory of the massive ethnic cleansing conducted on the basis of religion that followed the achievement of independence in August of 1947. History demonstrates that the multiethnic, multireligious nature of the Indian polity needs vigilant protection because allegedly nonviolent Indic people can and often do use violent means of self-preservation. Even today, we hear of communal riots and virtual pogroms against certain groups of people in parts of India: the destruction of the Babri Masjid mosque in Ayodhya in 1993; the 2002 riots in Gujarat that left a disproportionate number of Muslims dead; and more recent killings of Christians in Orissa, to name a few. Managing a plural nation remains a major challenge. Simply blaming either pluralism or religion for such problems is not a sensible

*In Retrospect and Prospect* (New Delhi: Deep & Deep, 1995); Dina Nath Raina, *Uniform Civil Code and Gender Justice* (New Delhi: Reliance, 1996); Madhukar S. Ratnaparkhi, *Uniform Civil Code: An Ignored Constitutional Imperative* (New Delhi: Atlantic, 1997); Virendra Kumar, "Uniform Civil Code Revisited: A Juridical Analysis of *John Vallamattom*," *Journal of the Indian Law Institute* 45:3–4 (July–December 2003): 315–334.

<sup>63</sup> See T. N. Madan, "Secularism in its Place," *Journal of Asian Studies* 46:4 (November 1987): 747–759; T. N. Madan, ed., *Religion in India* (Oxford: Oxford University Press, 2d ed. 1994); Robert D. Baird, ed., *Religion and Law in Independent India* (New Delhi: Manohar, 1993); Arun Shourie, *A Secular Agenda* (New Delhi: ASA, 1993).

<sup>64</sup> For U.S. law, see John Witte Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press, 3d ed. 2011); see also John Witte Jr. and Joel A. Nichols, "The Frontiers of Marital Pluralism: An Afterword" (in this volume).

academic approach, and secular fundamentalism is not a useful guiding principle in such culture-conscious surroundings.

While awaiting the implementation of a Uniform Civil Code, modernists pushed for the gradual creation of a more secularized, modernized Hindu law regarding families. Currently, there is pressure to bring about certain further reforms as evidence of modern secularity, specifically requiring compulsory registration of all marriages and making divorces available on the basis of irretrievable breakdown. Such reformist approaches, initially pursued in a spirit of post-colonial euphoria, are today pressed with seemingly desperate and stubborn determination despite evidence that they would be bad for many “slumdog citizens.” Such culture-blind prescriptions ignore the enormous tension between uniformity and diversity, failing to appreciate that any new legal regulation would influence the nature of the interaction between official laws and unofficial laws, between state law and the various forms of people’s law. To understand this legal labyrinth from a plurality-conscious perspective, one must look well beyond official law reports and statutes. The lived differences between the converged personal laws are currently rather small, but politicized sloganeering continues to exaggerate them by employing simplistic models and concepts of law to gain adherents to an allegedly progressive cause.

This leads to a depressing picture, and it seems remarkable how easily scholars get away with such games. The most prominent examples cited are that Muslims in India may have up to four wives (and thus, of course, many children) and their men can pronounce instant *talaq*. Few writers admit that far too many Hindu families continue also to have large numbers of offspring and that Hindu men are not exactly restrained from metaphorically throwing their wives to the wolves. Hindu polygamists openly benefit from the persistent nonimplementation of laws that would send Hindu polygamous males to jail for up to seven years. (And, of course, it seems unfair that Muslim polygamists would not face such penalties.) Indian courts have thus continued to administer the consequences of Hindu polygamy rather than enforce its abolition.<sup>65</sup> In reality, because Hindu men have found it much easier over the years to procure divorces,<sup>66</sup> and because South Asian Muslim women can – and increasingly do – abandon and divorce their husbands,<sup>67</sup> there are no significant legal differences between codified Hindu law and uncoded Muslim law. Even the extremely outdated Christian divorce law of India was quietly harmonized two weeks after 9/11 in the Indian Divorce (Amendment) Act of 2001, which introduced ten different grounds for divorce virtually overnight. Scholars thus use purported

<sup>65</sup> Menski, *Modern Indian Family Law*, ch. 3.

<sup>66</sup> Derrett, *The Death of a Marriage Law*.

<sup>67</sup> Vatuk, “Divorce at the Wife’s Initiative.”

legal contrasts between personal laws as political footballs without taking account of the application of the law itself.

The secular framework of the Indian Constitution, in its disavowal of religiously colored legal discourse, creates additional areas of underexplanation.<sup>68</sup> The extensive reform of modern Hindu law during the 1950s, for example, was, in reality, partly designed to make it acceptable to all Indians. This hidden uniformizing agenda, later reinforced by the Hindu Marriage (Amendment) Act of 1964 and particularly the Marriage Laws (Amendment) Act of 1976, created further convergence with the formal provisions of the secular Special Marriage Act of 1954. This strategy of artificial uniformization soon turned out to be hostile to women and children in practice, however. Merely assuming gender equality within a patriarchal setting actually advantaged men, creating new legal problems for women and other disempowered individuals.<sup>69</sup> Finally, as indicated earlier, the modernist ideology of legal uniformization collapsed as soon as the Hindu nationalist party rose to prominence in the 1990s and more people realized that insisting on a Uniform Civil Code might mean imposing Hindu law on all Indians. Since then, the Indian debates over the unification of family law have died down and scholars now openly refuse to discuss this issue.<sup>70</sup>

The desired uniformization strategy was bound to fail for other reasons as well. One of these is directly relevant to the present analysis. Postmodern Indians somehow began to remember fragments from their ancient legal past and realized the impossibility of total legal uniformity within Hindu law itself, let alone between the various personal laws and their partly religious identity markers. Recent recourse to old Hindu concepts suggests that legal reformers have at least partly overcome modernist myopia and have become more aware that modern statutory law could never completely replace the historically rooted, multi-tiered regulation mechanisms. Ridding this region of ancient cultural practices and its rich range of customs by ignoring the socio-legal and religious aspects of such mechanisms would mean depriving India's own people of their legal identity. Perhaps Indian lawmakers have also wisely realized the unsustainability of promoting laws tending toward extreme individualism, especially for a massive "slumdog" population. Postmodern legal positivism in India therefore now often explicitly accounts for socioreligious norms and local values within legislative provisions and in case law, even from the highest courts. The policy of harmonization or convergence, as some scholars

<sup>68</sup> See S. P. Sathe and Sathya Narayan, eds., *Liberty, Equality and Justice: Struggles for a New Social Order* (Lucknow: EBC Publishing (P) Ltd., 2003).

<sup>69</sup> Derrett's 1978 study, *Death of a Marriage Law*, marks the beginning of the end of specialist scholars' belief in following English legal developments through modernizing reforms in Indian family law.

<sup>70</sup> E.g., Parashar and Dhanda, *Redefining Family Law in India*, ix.

prefer to call it,<sup>71</sup> of India's personal laws is not a meek surrender to outdated concepts of non-state authority. Rather, it is a deliberate, plurality-conscious and highly sophisticated postmodern construct; it is a new attempt to make sense of the never-ending challenges of legal pluralism. This policy is virtually impossible to appreciate through applying only a state-centric lens and a superficial positivist analysis. It is increasingly evident that only pluralistic methodologies and techniques can open our eyes to what is really going on in Indian family law and can help the country fine-tune a sustainable system of family law regulation that straddles state and non-state laws.

#### V. POSTMODERN INDIAN AND HINDU MARRIAGE LAW

Although major Indian legal scholars seem bored with the perennial prominence of Hindu law, it constantly brings new surprises. The existing Hindu marriage law in India is a good example of a recycling of old substantive rules in the shape of modern statutory regulation. For example, at first sight modern Hindu law on marriage solemnization, codified and written in English, looks Westernized. However, the statutory law almost completely preserves the diversity-conscious, situation-specific methods of traditional Hindu law. Section 7 of the Hindu Marriage Act of 1955 provides for the solemnization of Hindu marriages:

7. Ceremonies for a Hindu marriage. –

- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
- (2) Where such rites and ceremonies include the *saptapadi* (that is, taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

Subsection 1 confirms unambiguously that the legal validity of a Hindu marriage in India is not determined primarily through state-controlled procedures such as formal registration, but rather the relevant criterion remains performance of customary marriage rituals. The modern state has thus chosen to put the old shastric law into statutory form without even attempting to change the law's substance or challenge its universal validity (provided that both parties to the marriage are Hindus). In cases of doubt, such as interreligious marriages solemnized according to Hindu rituals, Hindu litigants must simply prove that they followed the respective customary norms of marriage solemnization of either family. Although the statute seems to

<sup>71</sup> See Narendra Subramanian, "Legal Change and Gender Inequality: Changes in Muslim Family Law in India," *Law & Social Inquiry* 33:3 (Summer 2008): 631–672.

presume that customs are fixed and certain, observation in practice shows that every marriage solemnization can be treated as a uniquely constructed sequence of rites and rituals whose totality is then simply perceived and treated as customary. This is legal pluralism “on the ground,” with enormous and often highly meaningful variations in ritual patterns from case to case. Nobody, it seems, knows enough about these practices today to make final judgments about details.<sup>72</sup> Helpfully, the role of custom as a source of Hindu marriage law has been explicitly respected in general terms by statutory Hindu matrimonial law, as the statute defines custom as a usage “followed for a long time.”<sup>73</sup> How this squares with the perception of every ritual as an ad hoc construct eludes precise analysis. The most relevant issue here, however, is that a legally valid custom under the newly codified Hindu law need no longer be a custom observed “since time immemorial” (as was required under the earlier strict and hostile Anglo-Hindu law), but merely “for a long time.” This leads to some instructive cases addressing how long is “long.”

Two lines of judicial decisions address this question. The first reflects a type of patriarchal interference with basic gender justice through positivism, and it condones deliberate misuse of state law, in most cases to let polygamous husbands “off the hook.” *Bhaurao Shankar Lokhande v. State of Maharashtra*, in my view a misguided precedent, is still misused more than forty years later.<sup>74</sup> In that case, a Hindu husband successfully claimed that he was not validly married to his wife. The whole ceremony was held to be legally invalid merely because some element of the rituals was allegedly not “customary.” Few people realize that this case was about the emergence of new Buddhist customs, and many authors and cases blindly rely on this gender-insensitive decision.

The second line of cases better accounts for customary plurality and displays sensitivity to sociocultural factors, gender justice, and situation specificity. In *Sumitra Devi v. Bhikhan Choudhary*, a polygamous Hindu husband tried to claim that he was not validly married.<sup>75</sup> The court held for the wife by applying a presumption of

<sup>72</sup> On the problems of determining prohibited degrees of marriage among Hindus and the issue of custom, see Patricia Uberoi, “Saving Custom or Promoting Incest? Post-Independence Marriage Law and Dravidian Marriage Practices,” in Parashar and Dhanda, *Redefining Family Law in India*, 54–85.

<sup>73</sup> This, too, recycles tradition. Section 3 of the Hindu Marriage Act of 1955 provides:

### 3. Definitions

In this Act unless the context otherwise requires,

- (a) the expressions “custom” and “usage” signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: Provided that the rule is certain and not unreasonable or opposed to public policy; and provided further that in the case of a rule applicable only to a family it has not been discontinued by the family...

<sup>74</sup> AIR 1965 SC 1564.

<sup>75</sup> AIR 1985 SC 765.

Hindu marriage, in part because there had been a Hindu marriage ritual and there was also a child. Where local practice can be proved to exist over a few decades, especially among a large number of people, those new rituals are entitled to official legal recognition per this line of cases.<sup>76</sup>

Feminist, modernist observers argue that people should register their marriages, and then women would simply not have such problems. However, this state-centric remedy does not work in the “slumdog” conditions of India (a fact recognized by the statutory law).<sup>77</sup> The key issue thus is not whether judicial interpretations will privilege state law over social norms or religion, but whether there will be a fair hearing for both parties. More specifically, the question is whether judges will be gender-sensitive enough to resist the temptation to privilege men and their perspectives by relying exclusively on positive law. In a patriarchal setting, with very few senior women judges, there is no assurance that gender justice will be achieved. However, to abolish the existing law as a result of such problems seems an inadequate and rather excessive form of state intervention.

The potential conflict, moreover, is not actually between “law” and “religion,” because the modern Hindu law on marriage solemnization measures the legal validity of a Hindu marriage by recourse to traditional sociocultural norms rather than “religion” as a superior entity. I highlight this to emphasize that a multi-tiered system of family law regulation does not necessarily pit formal state law against religious authority. In the Indian case, formal state law is normally primarily opposed to countervailing social norms, not to religion as such. So the critical criterion for achieving better gender justice is how flexibly decision makers interpret socio-legal facts, and not whether they give in to religious authority.

This argument can be further strengthened. A more apparently religious element does exist and has caused some havoc, but only because gender-insensitive, tradition-focused judges have allowed it to dominate. Subsection 7(2) of the Hindu Marriage Act, cited previously, states that “[w]here such rites and ceremonies include the *saptapadi* ... the marriage becomes complete and binding when the seventh step is taken.” The statute itself thus indicates that this ritual may not always be performed. The ritual of *saptapadī* – the taking of seven steps by bride and bridegroom together, which in its pristine ancient form is a wonderfully dramatized friendship

<sup>76</sup> See the neo-Buddhist case of *Baby v. Jayant*, AIR 1981 Bombay 283, which is instructive even though only a High Court case.

<sup>77</sup> Section 8(5) of the Hindu Marriage Act of 1955 provides that “[n]otwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.” This means that the modern Indian state (like many states in Asia and Africa) accepts that the ultimate legal criterion of legal validity of a Hindu marriage remains a matter for society and depends on societal norms and facts rather than religious doctrine or bureaucratic criteria provided by state law, such as registration formalities.

ritual near the end of the ceremony as the spouses walk away from the fire – is not performed in most Hindu marriages. The assumption of the modern statutory wording clearly reflects that the Hindu ritual of *saptapadī* may be executed in many different ways – or not at all, depending on custom. The rest of the section indicates that its completion on the seventh step shall be the precise point at which the ritualized solemn contract of Hindu marriage becomes legally valid and binding.<sup>78</sup> This rule was copied directly from the ancient text of *Manusmṛiti* 8.227, where it had the obvious function of determining the precise point at which a Hindu marriage was legally binding.<sup>79</sup> The sacramental Hindu contract of marriage, according to the *Manusmṛiti* as well as Section 7(2) of the Hindu Marriage Act, may thus be completed on the seventh step of this particular ritual, but the *saptapadī* may be omitted entirely and the marriage will nonetheless still be treated as legally valid. However, some judges have failed to read the statute accurately and thus quite unfairly hand down adverse decisions to women.

Significantly, allegations by some Hindu husbands (or after their death by their male relatives) that a woman was not validly married mainly arise in disputes over property or maintenance or when husbands are faced with criminal prosecution for polygamy. In such cases, devious lawyers and tradition-fixated judges facilitate legal mischief of depriving women of property entitlements and status, regrettably even in the Supreme Court.<sup>80</sup> The battle over this issue continues in India today.

Plurality-conscious legal positivism, informed by culture-sensitive modern statutory Hindu law, has the capacity to take account of specific sociocultural factors to achieve situation-specific justice. This is done in Indian law by increasingly liberal use of powerful presumptions of marriage, as authoritatively stated in a leading handbook for practitioners:

Where it is proved that a marriage was performed in fact, the court will presume that it is valid in law, and that the necessary ceremonies have been performed. ...

<sup>78</sup> Contrary to almost exclusive emphasis on the sacramental nature of Hindu marriage in almost every textbook, a Hindu marriage is both a solemn contract and a sacrament.

<sup>79</sup> The verse suggests that the performance of certain rituals and use of *mantras* are an indication that Hindu marriage rituals are being performed, but the decisive ritual element shall be the seventh step of the *saptapadī*. One can envisage distressing situations where it might be crucial to know when precisely during the lengthy marriage rituals the parties were actually husband and wife: What if the groom died during the extended rituals? Was the bride to be treated as a widow, or could she undergo a further marriage to another man?

<sup>80</sup> *Bhaurao Shankar Lokhande v. State of Maharashtra*, AIR 1965 SC 1564, asserted that every Hindu marriage must involve a *saptapadī* and invocation of the fire to be legally recognized. Injustice was also done in *Surjit Kaur v. Garja Singh*, AIR 1994 SC 135, where apparent male chauvinist contempt for a remarried Sikh woman – specifically, slandering her to grab her deceased husband's property – did not strike the judges as a blatant abuse of the modern law. For excellent examples of judicial alertness, see *M. Govindaraju v. K. Munisami Gounder*, AIR 1997 SC 10 and *P. Mariammal v. Padmanabhan*, AIR 2001 Madras 350.

There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring, if from the time of the alleged marriage, the parties are recognised by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied.<sup>81</sup>

This legal position reinforces another important observation about multi-tiered Hindu matrimonial litigation. Modern Hindu law, like the old system, relies ultimately on judicial alertness – the skill of judges in dispute processing (described as “extracting the thorn” [*vyavahāra*]). The primary function of India’s modern judges continues to involve the removal of particular social hurts, including gender injustices, and not simply the slavish application of statutory law. Application of the *dharmic Grundnorm* on a case-by-case, situation-specific basis remains pertinent in Hindu law today. Reading modern Hindu family law through the pluri-focal lenses of the old law thus offers important lessons for global comparative lawyers and serves the ultimate aim of justice. Regrettably, most modernist observers cannot perceive Hindu law in this way because they too quickly presume that anything “Hindu” is necessarily (and unhelpfully) “religious.”

In India today, then, even in the absence of formal registration documents, a married woman’s legal status is protected by law if she can show through other evidence that she was in fact married. Indian state law has carefully crafted mechanisms to account for such claims and clearly remains conscious of “living law.” Given the public nature of Hindu marriage rituals, there will likely always be some witness to a marriage ritual who could speak in support of an individual faced with denial of her marriage. Applying presumptions of marriage offers a socially meaningful and effective remedy.<sup>82</sup> Significantly, some recent Indian reports suggest that unmarried cohabitation should now be recognized as equivalent to marriage. This modernist turn seeks to rename unregistered marriage as “unmarried cohabitation.” However, that renaming effort, seeking to copy Western models and apparently anticipating eventual recognition of same-sex relationships in Indian law, does significant cultural violence to many millions of Indians by treating traditional cultural patterns and legal practices with typical modernist contempt by failing to accord them the definition of marriage.

Modern Hindu and Indian law itself, however, quietly admits that there are limits to state-centric positivism, and it does not fuss about strictly preserving and following, let alone obeying, religious tradition. The question arises whether to interpret this

<sup>81</sup> Satyajeet A. Desai, ed., *Mulla’s Principles of Hindu Law* (New Delhi: Butterworths, 2004), 770–771.

<sup>82</sup> Presumptions of marriage are now also applied in some cases among Asians in Britain. See *Chief Adjudication Officer v. Kirpal Kaur Bath*, [2000] 1 Family Law Reports 8 [CA].



as giving in to *hindutva*, that is, a blanket recognition of Hindu tradition as evidence of continued self-controlled ordering or instead more as a consequence of resource limitations in “slumdog territory.” Probably all these factors (and others) play some role. The continuing legal recognition of unregistered marriages in Indian law is not an oversight or a slippage, however; it is a systemic necessity. Although modern Indian state law could dream of developing comprehensive socio-legal control, reliable records of how several hundred millions of people marry in their homes will never be produced.<sup>83</sup> India’s post-colonial positivists employed the ancient model of customary self-regulated order as a useful ingredient for reconstructing modern Hindu law. The real challenge today is to navigate gender-sensitivity and justice across the boundaries of state law and non-state law when contested cases come up before courts. Another challenge, and probably a more difficult one, is to persuade scholars that this multi-tiered system can be trusted to deliver justice to the people who need it most – women and children.<sup>84</sup>

Legal scholars today tend to argue that if individuals have a legal problem, they should turn to state law for help. They should not access traditional sources and certainly should not use religious authorities. However, evidence from Britain’s eighty-five Sharia Councils and Muslim Arbitration Tribunals confirms that such centralist claims overlook social reality and do not match with what is happening around the world. The Indian evidence clearly shows that most people do not turn straight to lawyers or courts; they first negotiate within their respective sociocultural spheres. Even if warring parties eventually turn to modern Hindu law mechanisms, the official law itself refers Hindus swiftly back to custom and lower-level processes for dispute settlement and ascertainment of what is appropriate. Superior Indian courts are far too busy, and seriously plagued by arrears, to become involved in airing “dirty laundry” in public, especially in divorce law.<sup>85</sup> The ancient Sanskrit term of *vyavahāra*, inadequately and too narrowly translated for centuries as “court proceedings,” in fact comprises all these various forms of dispute settlement, both

<sup>83</sup> Formal marriage registration remains an option for the elite and for those who require official documentation (e.g., to facilitate travel abroad). It is important to be aware that registered Hindu marriages are not automatically treated as legally valid in India. Indian law still requires proof that the requisite customary rituals were followed, a fact that causes much surprise in European embassies and courtrooms. See *Joyita Saha v. Rajesh Kumar Pandey*, AIR 2000 Calcutta 109, and the interesting case studies of Pervez Mody, “Love and the Law: Love-Marriage in Delhi,” *Modern Asian Studies* 36:1 (February 2002): 223–256.

<sup>84</sup> See McClain, “Marriage Pluralism in the United States” (in this volume) and Wilson, “The Perils of Privatized Marriage” (in this volume).

<sup>85</sup> Disgust over such warmongering is elaborately expressed in *V. Bhagat v. D. Bhagat*, AIR 1994 SC 710. This decision modified the Indian judicial approach to irretrievable breakdown of Hindu marriages as a ground for divorce, allowing it in exceptional circumstances, but without opening the floodgates because the case is not taken as a precedent. Significantly, the husband was a senior lawyer.

formal and informal, and is in itself a multi-tiered entity.<sup>86</sup> It is striking that such realizations are only evident to us now, in the postmodern age of reinventing the wheels of Indian justice.

#### VI. POST-DIVORCE MAINTENANCE LAWS, THE INDIAN CONSTITUTION, AND HINDU LEGAL CONCEPTS

Although postmodern Indian state law happily allows self-ordering in matrimonial matters, it has purposefully intervened to protect basic social welfare frameworks that continue to rely on traditional family structures for delivery. Rather misleadingly, this has been portrayed in most writing as a battle between state law and religion, and specifically between the secular Indian state and Islamic authorities (as epitomized in the world-famous *Shah Bano* affair and its aftermath). But this complex saga, too, is actually a contest between state-centric legal regulation and sociocultural delegation of important aspects of India's matrimonial law rather than simply a battle over "law" and "religion." Middle-class analysts conveniently forget that the Indian state actually seeks to avoid recourse to its formal support mechanisms as a critically important aspect of its "slumdog law" strategy, particularly when that would implicate state financial resources.<sup>87</sup> It is thus important to review how informal support mechanisms in Indian matrimonial law have evolved in the recent past and how they continue to contribute a vital element to India's multi-tiered marriage regulation by working to subjugate so-called religious dogma to the sophisticated social welfare agenda of the Indian state.

India's radically activist post-divorce maintenance law apparently seeks to protect "pre-existing rights" of divorced or widowed women.<sup>88</sup> As in earlier traditional patriarchal contexts, married women are entitled to receive support from their husbands during marriage, and they remain entitled to maintenance after the marriage ends, whether by death or otherwise. As indicated earlier, this neatly matches the redefinition of "wife" under Indian law after 1973, which explicitly includes "divorced wife" and presumes the inclusion of widows.<sup>89</sup> In brief: Postmodern Indian state law is clearly not afraid to confront, tackle, and co-opt other forms of law, including religious law, to construct a revised, gender-sensitive legal framework that protects and

<sup>86</sup> See Werner Menski, "On Vyavahāra," *Indologica Taurinensia* 33 (Turin: CESMEO, 2007), 123–147 (proceedings of the "Law and Society" Section of the 13th World Sanskrit Conference in Edinburgh, July 10th–14th, 2006).

<sup>87</sup> See Menski, *Modern Indian Family Law*.

<sup>88</sup> This concept is found hidden in fierce litigation during the 1970s over the succession rights of Hindu widows under Section 14 of the Hindu Succession Act of 1956. See *V. Tulasamma v. V. Sessa Reddi*, AIR 1977 SC 1944, and *Bai Vajia v. Thakobhai Chelabhai*, AIR 1979 SC 993.

<sup>89</sup> Code of Criminal Procedure § 125 (1973).

helps impoverished individuals, especially women, to “keep body and soul together” (as a famous judicial phrase goes).<sup>90</sup>

This remains an under-analyzed phenomenon in legal circles, even though I have written about it in some detail.<sup>91</sup> Significant Indian legal developments can be closely linked to 9/11, and Indian legal developments today are significantly influenced by the presence of a large Muslim minority that seeks to assert “religion” as an alternative legal authority. My analysis of politically sensitive issues along these lines has resulted in blacklisting by several Indian legal publishers, for it seemingly upsets the presuppositions of many scholars and lawyers about gender and law, law and religion, and especially about the political football of legal uniformity in India. I have nonetheless continued such writing and analysis because it comports with what actually goes on in Indian law today, even if it is not politically popular because it addresses the reality of “slumdog law.”

As a legal realist who conducts his own fieldwork, I observe that the Indian state today does not shy away from employing sociocultural and religious concepts to navigate and redefine, where necessary, the boundaries of state law and non-state law. Because such skillful navigation takes place on several levels at the same time, and because much other literature wrongly claims that the Indian state has surrendered power to religious dogma, a few extra words are needed here.

In essence, the Indian state employs two methods (often conceptually contradictory) to improve the financial position of potentially vulnerable individuals. First, since colonial times there have been efforts to strengthen the legal rights of women regarding property entitlements. These have given rise to some notable but piecemeal reforms. The Hindu Succession Act of 1956 went much beyond the earlier Hindu Women’s Right to Property Act of 1937 and its provision of a “limited estate” to Hindu widows. It secured, on paper at least, greater rights for Hindu women as

<sup>90</sup> *Bai Tahira v. Ali Hussain Fissalli Chothia*, AIR 1979 SC 362 (Mr. Justice V. R. Krishna Iyer (as he then was)). *Bai Tahira* was an important case before the more famous *Shah Bano* case, *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

<sup>91</sup> See Werner Menski, “Asking for the Moon: Legal Uniformity in India from a Kerala Perspective,” *Kerala Law Times* 2006(2), Journal Section: 52–78; Werner Menski, “Double Benefits and Muslim Women’s Postnuptial Rights,” *Kerala Law Times* 2007(2), Journal Section: 21–34; Werner Menski, “Literate Kerala, Bribes and a New Case of *Mata*: On the Limits of Judicial Patience and Legal Realism,” *Kerala Law Times* 2008(4), Journal Section: 21–31; Werner Menski, “The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda,” *German Law Journal* 9:3 (March 2008), available at <http://www.germanlawjournal.com>; Werner Menski, “Indian Secular Pluralism and its Relevance for Europe,” in *Legal Practice and Cultural Diversity*, eds. Ralph Grillo et al. (Aldershot: Ashgate, 2009), 31–48; Werner Menski, “Law, State and Culture: How Countries Accommodate Religious, Cultural and Ethnic Diversity: The British and Indian Experiences,” in *Cultural Diversity and the Law: State Responses From Around the World*, eds. Marie-Claire Foblets, Jean-François Gaudreault-DesBiens, and Alison Dundes Renteln (Brussels: Bruylant, 2010), 403–446.

absolute owners of property that earlier used to be joint family property. Section 14 of the 1956 act immediately made such Hindu widows the absolute owners of any share they previously held as a “limited estate,” leading to thousands of cases filed by enraged males, including many Sikhs.<sup>92</sup> The transition from joint family ownership to individual property rights was, however, never fully completed. Postmodern Indian law has gradually begun to rediscover the role and value of the family, particularly the joint family, as a most basic element of social welfare.

At the same time, Indian law has tenaciously pursued modernist tendencies and seeks to strengthen women’s property rights at the individual level. Most evidently for Hindus, this was finally achieved by amending the Hindu Succession Act in 2005 to grant equal birthrights in joint family property to Hindu sons and daughters throughout India. Such reform had gradually been implemented earlier in several southern states, which often – although not always – tend to be a little more enlightened when it comes to gender sensitivity. Concurrently, however, and to the chagrin of modernists and feminists, Indian law has also continued to make vulnerable individuals dependent on various welfare duties toward them delivered by those (mostly male) individuals who hold the purse strings and control property rights. This means not only that all parents have to pay for their children’s upbringing and welfare, but also that children have a legal duty to maintain their parents, when necessary, in accordance with the Maintenance and Welfare of Parents and Senior Citizens Act of 2007.

Further, in a move that upset some feminists, either Hindu husbands or wives may officially have to pay maintenance to their indigent spouse under Sections 24 and 25 of the Hindu Marriage Act of 1955. Whereas a Hindu husband who seeks to live off his wife in this way is publicly ridiculed in several reported cases, women who go to court claiming maintenance can today increasingly count on the state’s support for such gendered claims. The results have been truly amazing. Recent legal changes are now beginning to create new gender imbalances. A highly significant movement in the navigation of India’s multi-tiered maintenance laws occurred two weeks after 9/11 when the Code of Criminal Procedure (Amendment) Act of 2001 (Act No. 50 of 2001) removed the maximum allowable monthly maintenance payment (500 Rupees) that had been in place under Section 125 of the Criminal Procedure Code of 1973. The new law now permits all Indian wives (and ex-wives, by definition) to claim appropriate post-divorce maintenance. The principle is by now firmly entrenched in case law.

However, some recent cases suggest risks of new transgressions of gender balance when women attempt to misuse such rightly protective provisions.<sup>93</sup> The relative

<sup>92</sup> See *Partap Singh v. Union of India*, AIR 1985 SC 1695.

<sup>93</sup> See Menski, “Double Benefits and Muslim Women’s Postnuptial Rights” and Menski, “Literate Kerala, Bribes and a New Case of *Mata*.” Both articles concern cases in which divorced Muslim

scholarly silence about such emerging imbalances evinces either ignorance of case law developments at the High Court level (a familiar problem for Indian legal scholarship) or disgust that many Indian women ask for handouts from men rather than making claims in their own right. Either way, gender relations and marital expectations rather than matters of religious authority still occupy the center stage of Indian marriage dramas.

Silence about such significant recent legal developments also hides the fact that under current Indian law women can abuse the system in the precise manner that a leading Muslim scholar, Tahir Mahmood, warned of in 1986.<sup>94</sup> The strategy is simple. Marry a prosperous man, then divorce him or bring about a divorce (it does not really matter how), and then proceed to demand the considerable legal entitlements to post-divorce maintenance that Indian state law quietly introduced two weeks after 9/11. Such developments illustrate the concurrent contradictory moves of strengthening individual property rights for women, particularly through succession laws, on the one hand and reconnecting women to male authority through maintenance arrangements on the other. It is possible that this bifurcated, multi-tiered approach is actually designed to cater to elite women through one strategy while providing for India's millions of "slumdog women" through the other route. Nobody talks about this; legal developments just seem to happen. Here again, sophisticated official policies disclose lawmakers' plurality consciousness and acute awareness about an enormously different range of expectations among Indians when it comes to social welfare mechanisms.

Ultimately, the underlying agenda can be linked to protection of the constitutionally guaranteed right to life under Article 21 of the Indian Constitution as well as several other constitutional provisions. India's method of implementing such guarantees is to hold social actors accountable and restrain religious authority, where necessary, to ensure the survival of vulnerable individuals. This is, in my analysis, a solution based primarily on the ancient Indian concept of limited state regulation of the private sphere. The development of India's radical post-divorce maintenance law thus confirms that Hindu law has remained a much more important ingredient of Indian constitutional law than modernist writers would wish to know. The realities of such "soft legal positivism" in Indian family law influence the entire legal system as a whole and thus offer a blueprint for more sophisticated and culture-specific legal development in this internally pluralistic jurisdiction.

The focus of scholarly agitation, however, has distractingly been on Muslim law. Such agitation depicts a gender war between the supposedly secular post-colonial

women were able to rely on pro-women approaches. Another way to phrase this analysis, however, is that men have been unsuccessful in their attempts to avoid responsibilities.

<sup>94</sup> Tahir Mahmood, *Personal Laws in Crisis* (New Delhi: Metropolitan, 1986), 127–130.

Indian state and the medieval-rooted Muslim authorities who seek to deny Muslim wives basic entitlements from an ex-husband after divorce. Verse 2.241 of the *Quran* itself, typically vague, merely suggests that a divorcing husband should be kind to the woman he divorces. Early Islamic scholar-jurists interpreted this verse to impose responsibility on the husband for maintenance of an ex-wife until it was clear that any child she might bear was the child of the ex-husband. Then she could, and should, move on. This means that a Muslim woman who has just given birth cannot even rely on the traditional *iddat* rule for one day;<sup>95</sup> she is instantly without support, even though the father has an obligation to maintain the child. There is strong evidence that Muslim men everywhere manipulate such rules to their advantage, and it is clear that Muslim jurists agreed over time to limit the *iddat* payments to roughly three months. This is also unjust.

Under Indian law, however, a guiding principle has been established since 1979 that maintenance arrangements must be sufficient to “keep the woman’s body and soul together.”<sup>96</sup> In the infamous *Shah Bano* case of 1985, this development was dramatically challenged by a senior Muslim lawyer through reliance on Islamic religious authority.<sup>97</sup> Terminating his marriage to Shah Bano after some forty years, he had offered her some small amounts of payment that technically complied with Muslim law but violated the emerging principles of Indian general law. On appeal before the Supreme Court, Shah Bano won a crucial victory and secured maintenance for life. Five Hindu judges interpreted the relevant *Quranic* verses and held that there was no conflict between the *Quran* and India’s secular Criminal Procedure Code of 1973 (which overrode the religious personal law in any event). Because the Indian Supreme Court further needled Muslims by suggesting that India should introduce a Uniform Civil Code, widespread public unrest followed almost instantly.

The rest is much-misunderstood recent legal history. The Indian government quickly promulgated an act that seemed to take away the right of divorced Muslim wives to post-divorce maintenance beyond the three-month *iddat* period.<sup>98</sup> However, despite the assertions of irate scholars and many others, the Indian government did not let Muslim women down. It cleverly hid within the 1986 act a wording that became, in due course, a silver bullet for all Indian ex-wives. Section 3(1)(a) states that a divorced Muslim wife shall be entitled to “a reasonable and fair provision and

<sup>95</sup> The *iddat* period is basically a woman’s menstrual cycle of three months, or about ninety days.

<sup>96</sup> *Bai Tahira v. Ali Hussain Fissalli Chothia*, AIR 1979 SC 362.

<sup>97</sup> *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945. See also Bix, “Pluralism and Decentralization” (in this volume) and Nichols, “Reconsidering the Boundaries” (in this volume).

<sup>98</sup> The Muslim Women (Protection of Rights on Divorce) Act (1986) actually does what its name suggests, however: It protects the rights of divorced Muslim wives. This was authoritatively confirmed by the Indian Supreme Court in *Danial Latifi v. Union of India*, 2001 (7) SCC 740.

maintenance to be made and paid to her within the *iddat* period by her former husband.” Since 1988, this provision has been authoritatively interpreted to mean that divorced Muslim wives are entitled to two types of support: maintenance during the *iddat* period and reasonable provision for her life after that. Both types of support must be made during the *iddat* period, so that a wife who finds herself virtually on the pavement in “slumdog land” has instant access to the courts. The Supreme Court, in *Daniyal Latifi*, calmly confirmed that position, albeit after fifteen years of studied silence – and no riots ensued at that particularly well-chosen moment, two weeks after 9/11.

Worldwide scholarship, however, continues to misguidedly assert that Indian law gave in to religious fundamentalism from 1986 onward. Nothing could be further from the truth. India’s multi-tiered post-marriage law has clearly subjugated allegedly religious doctrine, and it works assiduously for better gender justice by remembering and actively co-opting religious and social normative orders. Navigation of the boundaries of general laws and personal laws has been a remarkable success. Now the challenge is to protect such achievements and to avoid turning gendered rebalancing into gender war.

## VII. CONCLUSION

The conceptually mature nature of postmodern Indian family law as a harmonized personal law system is beginning to become more apparent today. There is solid evidence that the Indian state has managed to regulate the majoritarian Hindu family law in a uniquely hybrid manner, navigating the boundaries of past and present, tradition and modernity, state law and non-state laws. Additionally, by overriding traditional and “religious” dogma when necessary, postmodern Indian family law has created an increasingly strong social welfare net through combining old principles of socioeconomic responsibility with newly worded and socialism-inspired constitutional principles.<sup>99</sup> Indian state law’s strategically wise and financially prudent reliance on traditional self-control mechanisms within society illustrates the extent of navigation between the multiple tiers of general law and personal laws. It also makes sophisticated use of internal tiers of pluralism within the various personal laws.

This analysis confirms that today’s modern-looking Indian family law system is not just “modern,” but consciously postmodern. It is definitely no longer built on a primary assumption that total legal control of society can be exercised by state-made laws. New methods of “soft legal centralism” or “soft positivism” illustrate that India’s state law has again learned to delegate much legal authority to society, but not – I must reiterate here – to religious authority. Linking concepts

<sup>99</sup> See Menski, *Modern Indian Family Law*.

like *hindutva* (Hinduness) with theocracy is merely ideological scaremongering. Crucially, the “soft positivism” of Indian law today is able to trust the social sphere, while co-opting it ever more closely. After all, both have been sharing the same social space and awareness of ancient legal tradition and are deeply sensitized to each other’s presence. The mutually beneficial collaboration between old and new in Indian matrimonial laws is clearly a plurality-conscious reconstruction, a multi-tiered arrangement that works with increasing efficiency for more than a billion people. It is protected by an umbrella of powerful constitutional guarantees, some of which have acquired increasingly direct relevance. The inevitable result of this strategic alliance is that state law thereby delegates a considerable amount of legal authority to the social sphere and to non-state laws. This is, at least for me, not only a good and sustainable form of managing positive law, but it also evidences the living reality of legal pluralism as a superior technique in today’s multi-tiered world for handling the immense, never-ending challenges in the search for justice.

My pluralistic analysis also supports the argument that the so-called religious personal laws of Asian and African countries today are themselves multilevel mechanisms of governance that are crucial to the maintenance of appropriate standards. They are largely secular, not just “religious,” and they not only show remarkable resilience but are also essential for good governance and maintenance of the nation’s identity. These “traditional” laws and their sociocultural norms are now clawing back territory that seemed lost earlier. Meanwhile, to many skeptical observers, they seem to have infiltrated, undermined, and subverted modern state laws in Asia and Africa, causing consternation and surprise among modernists and positivists. However, these “traditional” forces are not coming back to rule absolutely; they never did so in the first place. Rather, they are actually making their customary contributions as support mechanisms for governance within postmodern systems that we can observe and study as intrinsically multi-tiered and internally pluralistic.

In India, state-centric positivism of the colonial and early post-colonial type has clearly lost credibility and stands on increasingly questionable moral authority. Similarly, insistence on simple universal “rule of law” arguments or on globally uniform standards of human rights sounds increasingly absurd for a legal system that fails to provide direct welfare remedies for hundreds of millions of people living below the poverty line. Speaking and writing about “slumdog law” seems to irritate some of my colleagues as well as Indian lawyers, but how does one protect the rights of those people who have no means to assert them? India knows many ancient answers to such burning questions and has been experimenting with various methods. When a leading Indian scholar argues that human rights are not gifts of the West and highlights instead that the local, and not the global, “remains the crucial site for the enunciation, implementation, enjoyment, and exercise of human



rights,”<sup>100</sup> we should realize that India still needs a sensible state – but it has to be a soft and yet strong central state, prepared to listen to other voices than its own.

This retraditionalization of post-colonial Indian laws and their transformation into postmodern laws is partly built on vague memories and sketchy knowledge of ancient legal concepts. It has gone hand in hand, however, with a conscious and gradually more vocal rejection of state-centric Western models and legal rules. This development was foretold in the 1970s when Derrett observed that prominent Supreme Court judges like V. R. Krishna Iyer were turning their backs on the “Anglophilic bias in Bharat’s justice, equity and good conscience,” arguing that “free India has to find its conscience in our rugged realities and no more in alien legal thought.”<sup>101</sup>

Indira Gandhi must have thought about *dharma* rather than positive law when she engineered the Indian Emergency during the 1970s, partly to remind Indians that legal developments were not going in the right direction. Of course her self-serving actions overshadow much of the analysis. However, her most famous electoral slogan, *garībī hatāo* (banish poverty), anticipates concern for “slumdog law.” It contains a manifesto of development that cannot be implemented unless the ancient concepts of inevitable interconnectedness and responsibility for “the other” are remembered and practiced. This restructuring, based on ancient Hindu concepts of *rājadharma*, includes the ruler’s duty to maintain a sustainable balance in a deeply heterogeneous society. Recent Indian phenomena like public interest litigation show that recycling ancient concepts can promote badly needed forms of justice today.

Using such borrowings from the legal past, it has become possible for secular Indian constitutional law to develop a new culture-specific style of plurality-focused legal positivism that remains closely related to Hindu principles and elements of other personal laws, including Muslim law. Rather than constituting evidence of the state giving in to religious claims, as some modernists suggest, this sophisticated strategy of reconnection makes society and religion work for the overarching agenda of the state. Relying on ancient holistic concepts of duty, it seems that Indian public and private law can actually make somewhat larger claims on individual citizens than can Western-style laws. Politician-lawmakers of modern India, as well as many judges, are now appealing more openly to such duty consciousness, asking for greater moral integrity and even *dharma* sensitivity.

My observations suggest that Indian law has been moving toward further indigenization in two other major ways. First, through increased awareness of the continued relevance of traditional sociocultural concepts, Indian state law is acutely sensitive to legal pluralism and its manipulative and dynamizing potential. Second, there

<sup>100</sup> Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002), vi and 89.

<sup>101</sup> J. Duncan M. Derrett, *Essays in Classical and Modern Hindu Law: Anglo-Hindu Legal Problems*, vol. 3 (Leiden: E. J. Brill, 1977), xxi.

is stronger realization that the application of foreign-style laws and Western legal concepts like individualism and privileged treatment of contract law and private property do not suit Indian socioeconomic and legal “slumdog” conditions; instead, readjustment by strengthening duty-based normative systems is necessary.

It is prudent (and realistic) to be constantly alert to the never-ending expectations of justice to face the existing enormous challenges. The lessons learned by post-colonial India in this respect point to serious dissatisfaction with positivistic modernity. There is nothing religious or fundamentalist about this, as the search for appropriateness and justice within the composite pluralistic structure of Indian legal systems is not a doctrinal matter of religious belief or social dictate. It is instead an endeavor to establish a somewhat idealistic approach in which religion and ethics, society and state (and really all aspects of life) are intimately interconnected.

Indian legal realism, today no longer in its embryonic stage, has managed to cultivate the customary plurality of traditional Hindu family law. It has not abandoned reformist agendas and human rights ideals by listening to such tradition. But neither is it blinded by intellectual dogmatisms. Rather, Indian law is desperately searching for sustainable practical justice and appropriateness, not for an ideal Hindu ideology as opponents of the personal law system constantly insinuate. Taking a holistic, plurality-conscious approach to the development of Indian personal laws, one can therefore see that the postmodern Indian state values substantive reforms more than ideology and rhetorical uniformity, especially when financial implications are involved.

This exceptionally sophisticated legal rearrangement, outwardly engineered by swift positivist lawmaking but inspired by deeply considered socio-legal and ethical concerns, may eventually be understood as a key example of postmodern legal reconstruction. It demonstrates a spirit of plurality consciousness, helps us to understand plurality of law as a global phenomenon, and suggests that all legal systems are culture-specific constructs that need to match their respective populations. Because the population of the United States, as an immigrant country, is composed of so many different elements and entities, it is hardly surprising that multi-tiered methods of regulating family law have been developing over time.<sup>102</sup> It is thus necessary, it seems to me, to acknowledge that exclusive state control of the wide domain of family law is not a realistic possibility in our postmodern times. That message, an ancient and almost forgotten truth, is evidently being remembered and now applied in Indian family law. It is a globally valid message that countries need to translate into suitable legal arrangements to fit the culture-specific needs of their respective populations. Trying to exile religion from this pluralistic scenario appears to be, in light of the Indian experience, an entirely futile endeavor.

<sup>102</sup> See Estin, “Unofficial Family Law” (in this volume) and Nichols, “Reconsidering the Boundaries” (in this volume).

Statutory law, case law, and minor portions of customary and religion-based laws are well documented and readily accessible. Fortunately, from the point of view of a foreign reader, nearly all of the law currently prevalent in India is available in English. Export citation Request permission. Copyright. COPYRIGHT: © 2008 by the International Association of Law Libraries. References. Hide All. Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India. Werner Menski. Multi-Tiered Marriage and the Boundaries of Civil Law and Religion. Published online: 05 November 2011. Chapter. Indian law and politics have ever since vacillated between "legal pluralism - the notion that religion is the basic unit of society and different religions must have different legal rights and obligations" and "legal universalism" the notion that individuals are the basic unit of society and all citizens must have uniform legal rights and obligations".[15]. While texts on ancient Hindu law have not survived, texts that confirm the existence of the institution of lawyers in ancient India have.[43] The Sanskrit text Vivadarnavasetu, in Chapter 3, for example, states Modern Common and Civil Law Systems. Today the difference between common and civil legal tenets lies in the actual source of law. Common-law systems make refer extensively to statutes, but judicial cases are considered the most important source of law, allowing judges to proactively contribute to rules. For example, the elements needed to prove the crime of murder are contained in case law rather than defined by statute. For consistency, courts abide by precedents set by higher courts examining the same issue. In civil-law systems on the other hand, codes and statutes are designed to cover al India-one of the largest democracy has a multiparty parliamentary system, vociferous media, and vigilant NGO's. Besides this, its traditional, cultural, religious, and linguistic edifice is based on diversity, which is cherished by all more. Compromising with the personal law may lead to an identity crisis that may not be in the interest of "Unity in Diversity". Moreover, the Constitution of India under Part III provides for the Right to protect, propagate one's own religion and culture which in turn means to preserve religious identity which includes practices, norms, way of life. These specifications are entirely under the ambit of Personal laws. The problem of achieving Uniform Civil Code is not Muslim centric, rather codification of un-similar religious laws into a single mold is the real problem. Modern civil law systems, which were originally developed in Western European countries, have spread throughout the world. The term civil law also applies to all legal proceedings that are not criminal. Private law includes the rules governing civil and commercial relationships such as marriage, divorce, and contractual agreements. Public law consists of matters that concern the government: constitutional law, criminal law, and administrative law. Cross-examination of witnesses by the opposing party's attorney is rare. Instead, a civil law action consists of a series of meetings, and letters through which testimony is taken, evidence is gathered, and judgment is rendered. This eliminates the need for a trial and, therefore, for a jury.